NO. 21-15414

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Plaintiffs/Appellants,

v.

DAVID DUNCAN, in his official capacity as director of the California Emergency Medical Services Authority; et al.

Defendants/Appellees.

On Appeal from the United States District Court
For the Eastern District of California
Honorable John A. Mendez
E.D. Cal. Case No. 2:20-v-01238-JAM-DMC

ANSWERING BRIEF OF DEFENDANT/APPELLEE DR. TROY FALCK in his official capacity as Medical Director of the SSVEMS Agency

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I. INTRODUCTION

Why is Fernando Herrera suing Dr. Falck?

Plaintiff/Appellant FERNANDO HERRERA ("Herrera") has been convicted of two felonies: assault with a deadly weapon (a knife) and witness tampering. ER-88. Herrera was released from prison in 2018. ER-88. Pursuant to the State of California's regulations, Herrera cannot be certified as an Emergency Medical Technician ("EMT"), because he is a two-time felon, Cal. Code Regs. tit. 22, § 100214.3(c)(3), and because he was convicted of a felony and released from prison within the last ten years, Cal. Code Regs. tit. 22, § 100214.3(c)(6).

Having served as a volunteer inmate firefighter in California's Conservation Camp Program while incarcerated, however, Herrera may now petition for expungement of his convictions pursuant to the recently enacted AB 2147. Upon filing a successful petition, Herrera could be certified as an EMT because the provisions of Cal Code Regs. tit. 22, § 100214.3 would no longer affect him. ER-43-46, 91-92. Yet Herrera has not pursued this relief. ER-91-92. Instead, he sues Defendant/Appellee Dr. TROY FALCK, in his official capacity as the Medical Director of the Sierra-Sacramento Valley Emergency Medical Services ("SSVEMS") Agency, alleging that by following the State's regulations pertaining to two-time and recent felons, Dr. Falck is violating Herrera's constitutional right to be certified as an EMT.

Herrera has no business suing Dr. Falck, who should never have been included as a party in this lawsuit. On appeal, Herrera makes no argument as to why Dr. Falck should be a defendant. The district court's dismissal of Dr. Falck should be affirmed.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

With respect to Dr. Falck, the issues presented are:

1. Is Dr. Falck a proper defendant when the challenged regulations are promulgated by the State of California and Dr. Falck "must . . . follow these regulations"?
2. Is Herrera a proper plaintiff when he is eligible for AB 2147 relief?

III. STATEMENT OF THE CASE

A. The Regulatory Framework At Issue

The Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act ("EMS Act") was enacted in 1980 to provide a statewide system for emergency medical services and to ensure effective and efficient emergency medical care for the people of California. Cal. Health & Safety Code §§ 1797.1, 1797.6; *County of Butte v. Emergency Med. Servs. Auth.*, 187 Cal. App. 4th 1175, 1181 (Cal. Ct. App. 2010). The EMS Act created a two-tiered regulatory system governing virtually every aspect of prehospital emergency medical services. *Id.*

At the first tier of governance, the State's Emergency Medical Services Authority ("EMSA") coordinates emergency medical services throughout the State by 1) assessing the effectiveness of each emergency medical services area (Cal. Health & Safety Code § 1797.102); 2) developing "planning and implementation guidelines for emergency medical services systems," addressing, among other issues, manpower and training (Cal. Health & Safety Code § 1797.103); 3) providing technical assistance to agencies, counties and cities relating to emergency medical services systems (Cal. Health & Safety Code § 1797.104); and 4) reviewing emergency medical services plans submitted by local emergency medical services agencies to determine, among other things, whether the plans are consistent with "both the guidelines and regulations" established by EMSA (Cal. Health & Safety Code § 1797.105). *County of San Bernardino v. City of San Bernardino*, 15 Cal. 4th 909, 915 (Cal. 1997).

The second tier of governance are the local emergency medical services agencies ("LEMSAs"). The LEMSAs are designated by counties to 1) plan, implement and evaluate an emergency medical services system, 2) develop a formal plan for the system in accordance with EMSA's guidelines and submit that plan to EMSA on an annual basis, and 3) coordinate and facilitate the emergency medical services system consistent with the plan. Cal. Health & Safety Code §§ 1797.204, 1797.250, 1797.252, 1797.254; *County of San Bernardino*, 15 Cal. 4th at 916. A

LEMSA may not implement a local emergency services plan that EMSA determines to be not consistent with applicable guidelines and/or regulations established by EMSA. Cal. Health & Safety Code § 1797.105(b). EMSA is authorized to generate rules and regulations to carry out its purposes. Cal. Health & Safety Code § 1797.107.

Herrera challenges two of EMSA's rules regarding the certification of EMTs:

- Cal. Code Regs. tit. 22, § 100214.3(c)(3), which denies EMT certification to applicants who have been convicted of two or more felonies (the multiple felony ban); and
- Cal. Code Regs. tit. 22, § 100214.3(c)(6), which denies EMT certification to applicants convicted and released from incarceration for a felony offense during the preceding ten (10) years (the recent felony ban).

B. Procedural History Leading Up To The First Amended Complaint

Plaintiff/Appellant DARIO GURROLA ("Gurrola") filed the Complaint in this action on June 19, 2020 against Defendants/Appellees DAVID DUNCAN, in his official capacity as the Director of EMSA, and JEFFREY KEPPLE, in his official capacity as Medical Director of Northern California EMS, Inc. ("Nor-Cal EMS"), a LEMSA. Gurrola alleged that he has been convicted of two felonies – possession of

a concealed weapon and assault – and that he is barred from certification as an EMT pursuant to the multiple felony ban. FalckSER-32-33 (¶¶12-13), 38 (¶¶ 54-56). Gurrola sued Duncan, the EMSA Director, and Kepple, the Medical Director of the LEMSA to which he alleged he would apply, to challenge the constitutionality of this regulation. FalckSER-42 (¶ 88).

On August 18, 2020, in a Joint Status Report filed by the parties, Gurrola indicated his intention to amend the complaint to add a second plaintiff who would challenge the constitutionality of the recent felony ban, Cal. Code Regs. tit. 22, § 100214.3(c)(6). Gurrola stated that this amendment might also involve naming a second medical director from a different LEMSA. FalckSER-24.

On September 15, 2020, the First Amended Complaint ("FAC") was filed, naming Herrera as the second plaintiff and Dr. Falck, in his official capacity as the Medical Director of the SSVEMS Agency, as the second medical director defendant from a different LEMSA. ER-80. In addition to having multiple felony convictions (assault with a deadly weapon and witness tampering), Herrera is also barred from EMT certification by the recent felony ban, having been released from prison in 2018. ER-88 (¶ 58). Herrera alleges that he would apply to the SSVEMS Agency for EMT certification, but for the bans on recent and repeat felons. ER-97 (¶¶ 139-140). The SSVEMS Agency is a public entity. *See* Falck's Request for Judicial

Notice in Support of His Answering Brief ("Falck RJN") No. 1: Notices to Secretary of State as to Joint Powers Agreement; Cal. Gov't Code § 6507.

C. The Enactment Of AB 2147

In the weeks between the filing of the Joint Status Report and the filing of the FAC, California's Governor approved the State Legislature's enactment of AB 2147. This statute significantly modifies the effect of the EMT certification bans for felons who volunteer to fight fires during their incarceration.[1] ER-43-46. Recognizing that released inmates who served the State in fighting fires "should be granted special consideration relating to their underlying criminal conviction," AB 2147 does more than lift the EMT certification bans. ER-44, Sec. 1(j). It allows felons who successfully participated in the California Conservation Camp program or in a county incarcerated individual hand crew, excluding those who committed certain specified crimes, to petition the court in the county of sentencing for an order setting aside their convictions and releasing them from all penalties and disabilities resulting from the convictions (with the exception of driver's license suspensions and revocations, firearms prohibitions, and prohibitions from holding public office). ER-44-45; Cal. Penal Code § 1203.4b(c)(1) & (d)(3)(4). Generally, a felon who is

[1] Interestingly, press coverage of AB 2147 featured plaintiff Herrera himself as an example of why the bill was needed. *See* Falck RJN No. 2: "CA Bill Could Help Inmate FFs Find Future in Fire Service" and "These California inmates risked death to fight wildfires. After prison, they're left behind."

granted relief under AB 2147 "shall not be required to disclose the conviction on an application for licensure with any state or local agency."[2] ER-45; Cal. Penal Code § 1203.4b(c)(1).

D. Herrera's Allegations In The FAC

Herrera grew up in Marysville, California, in Yuba County, where he was convicted of two adult felonies: assault with a deadly weapon (a knife), then one year later, witness tampering. He was sentenced to prison. ER-87-88. While incarcerated, Herrera served in the California Conservation Camp program, helping to battle a major fire. ER-91 (¶ 84). He was released from prison in 2018. ER-88 (¶ 58).

Dr. Falck is the Medical Director of the SSVEMS Agency, a LEMSA that administers EMT certification in parts of Northern California, including Yuba County. ER-83-84. If the State regulations banning recent and repeat felons were removed, Herrera would apply for certification with the SSVEMS Agency. ER-97 (¶ 140). Herrera has not applied for EMT certification, because it would be "a pointless waste of time and money" given his felony status. ER-97 (¶ 139). LEMSA medical directors, such as Dr. Falck, "must and do follow" the State's regulations

[2] AB 2147 relief does not relieve the felon from disclosing his or her conviction in response to a direct question contained in an application to become a a teacher, peace officer, public officeholder, or contractor with the California State Lottery Commission. ER-46; Cal. Penal Code § 1203.4b(d)(2).

regarding EMT certification. ER-93 (¶ 97).

Herrera has not sought to have his conviction set aside under AB 2147, because it would require him to petition in a court far from where he lives (or find lawyers who will do so), and because his petition could be denied at the discretion of a superior court judge. ER-45, 91-92 (¶ 88); Cal. Penal Code § 1203.4b(b)(1), (c)(1) & (c)(3).

The FAC sought only declaratory and injunctive relief against all defendants. ER-106.

E. Defendants' Motions To Dismiss

All defendants moved to dismiss the FAC. ER-114-15. Plaintiffs opposed the motions, but did not request leave to amend. FalckSER-8-22. Finding the challenged regulations to be rationally related to the State's legitimate interest in ensuring public safety, the district court granted the motion to dismiss with prejudice and entered judgment. ER-3-22.

Plaintiffs now appeal, including Herrera's appeal of that portion of the judgment against him and in favor of Dr. Falck.

IV. SUMMARY OF THE ARGUMENT

The judgment may be affirmed on any ground supported by the record, even if the district court did not rely on that ground. The judgment for Dr. Falck should be affirmed, because he is not a proper defendant in this action for either the facial

or as-applied challenge. The challenged regulations were promulgated by the State of California, not the SSVEMS Agency. Nor can Herrera establish that Dr. Falck has deprived him of any rights, as Herrera has never asked Dr. Falck or the SSVEMS Agency to act on any application for his certification.

Alternatively, the judgment for Dr. Falck should be affirmed because Herrera is not a proper plaintiff for either the facial or as-applied challenge in this action. The intervening enactment of AB 2147 deprived Herrera of standing to challenge the State's regulations and mooted his case. Herrera did not seek leave to amend below and does not argue on appeal that leave to amend should have been granted. His complaint therefore fails to state a claim and cannot be cured.

The judgment for Dr. Falck should be affirmed.

V. ARGUMENT

A. Standard Of Review

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1175 (9th Cir. 2021); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 477 (9th Cir. 1998). The Court may affirm the judgment on any basis supported by the record, even if the district court did not rely on that basis. *Video Software Dealer's Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009); *Gemtel Corp. v. Cmty. Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542,

1546 (9th Cir. 1994); *Shaw v. State of California Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986).

B. The Judgment For Dr. Falck Should Be Affirmed Because Dr. Falck Is Not A Proper Defendant Under *Monell*

Herrera named Dr. Falck in his official capacity as Medical Director of the SSVEMS Agency. An official capacity suit is a suit against the entity itself. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Judgment for Dr. Falck in his official capacity – i.e., the SSVEMS Agency – should be affirmed because Herrera failed to allege facts sufficient to state a claim against the SSVEMS Agency.

Section 1983 requires Herrera to plead that the SSVEMS Agency deprived him of rights secured by the Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). The SSVEMS Agency is a public entity. *See* Falck RJN No. 1: Notices to Secretary of State as to Joint Powers Agreement. To state a Section 1983 claim against a public entity, Herrera must allege facts showing that the injury-inflicting action flowed from the SSVEMS Agency's own policies and practices. *Monell v. Dep't of Soc. Servs. Of City of New York*, 463 U.S. 658, 690 (1978). Municipal liability under Section 1983 attaches only where local officials, responsible for establishing final policy with respect to the subject matter in question make "a deliberate choice" to follow a course of action "from among various alternatives." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The

FAC contains no factual allegations showing that the SSVEMS Agency made a deliberate choice from among various alternatives to deprive Herrera of a right secured by the Constitution or federal laws.

1. The FAC Alleges No Facts Showing That The SSVEMS Agency Made A Deliberate Choice

When complying with mandatory EMSA regulations, LEMSAs, such as the SSVEMS Agency, are not making a deliberate choice. Because freedom to act is inherent in the concept of choice, a municipality's compliance with state law mandates is not a conscious choice capable of conferring municipal liability under Section 1983. *Vives v. City of New York*, 524 F.3d 346, 353 (2d Cir. 2008). The FAC makes explicit that EMSA "promulgated the regulations at issue" in this case – Cal. Code Reg. tit. 22, § 100214(c)(3) and (c)(6) – and that compliance with these regulations is mandatory. ER-83 (¶ 10), 92 (¶¶ 92-95). The medical directors of LEMSAs, such as Dr. Falck, have no choice: they "must and do follow these regulations." ER-93 (¶ 97). Were a LEMSA to deliberately disregard these regulations, the EMSA Director could disapprove the LEMSA's services plan as being not consistent with applicable guidelines and/or regulations established by EMSA. Cal. Health & Safety Code § 1797.105(b). In complying with the State regulations, Dr. Falck is not acting as a policymaker for the SSVEMS Agency, but rather as a policymaker for the State. *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 785-86 (1997).

Herrera is not suing the SSVEMS Agency for its own policies, but rather for the State's policies. The proper defendant for that challenge is EMSA Director Duncan. Dr. Falck's presence in this litigation is duplicative, unnecessary, and improper. Because the FAC fails to state a *Monell*-type claim against the SSVEMS Agency, the judgment for Dr. Falck in his official capacity should be affirmed.

2. Herrera Does Not Allege Facts Showing That The SSVEMS Agency Deprived Him Of A Constitutional Or Federal Statutory Right

The FAC also fails to state a plausible claim against Dr. Falck in his official capacity, because it does not allege that the SSVEMS Agency deprived Herrera of a constitutional or federal statutory right. Herrera does not allege that he has a statutory right to EMT certification, and his briefing and that of all the amicus filers – the Pacific Legal Foundation, the ACLU and NAACP Legal Defense & Educational Fund, the DKT Liberty Project, the Cato Institute, Collateral Consequences Resource Center, Clause 40 Foundation, Law Enforcement Action Partnership, the MacArthur Justice Center, the R Street Institute, the Sentencing Project, and the National Association of Criminal Defense Lawyers – *collectively* have failed to identify a single case in which the Fourteenth Amendment was found to prohibit states from regulating entry into a medical profession. Such regulations have long been upheld. *Hawker v. People of New York*, 170 U.S. 189, 200 (1898) (practice of medicine); *Weiss v. N.M. Bd. of Dentistry*, 798 P.2d 175, 181 (N.M.

1990) (dentistry); *Warmouth v. Delaware State Bd. of Examiners in Optometry*, 514 A.2d 1119, 1123 (Del. Super. Ct. 1985) (optometry); *Bhalerao v. Illinois Dep't of Financial and Professional Regulations*, 834 F.Supp.2d 775, 796 (N.D. Ill. 2001) (medical license); *Dittman v. California*, 191 F.3d 1020, 1032 (9th Cir. 1999) (acupuncture).[3]

Yet the Court need not reach the question of whether Herrera has a constitutional right to EMT certification to affirm the judgment for Dr. Falck. Even if Herrera were to have such a right, the SSVEMS Agency did not deprive him of it. Dr. Falck's agency took no action with respect to Herrera. Herrera has never applied for certification to the SSVEMS Agency or any other LEMSA, asserting that the State's regulations make it "pointless." ER-88 (¶ 63). In fact, on appeal, Herrera makes no arguments whatsoever as to why Dr. Falck should be included as a defendant in his constitutional challenge to the State's regulations on EMT

[3] Plaintiffs' breezy assertion that "rational-basis claims have won again and again *in cases like this one*" is made possible by their failure to define what constitutes a case "*like this one*." AOB at 27. This case involves regulations on providers of healthcare. Plaintiffs reference no case that construed the Fourteenth Amendment to require a felon to be admitted into a medical profession. The few cases that they cite, involving healthcare occupations, all construe state law. *Shimose v. Hawai'i Health Sys. Corp*., 345 P.3d 145, 148 n.1 (Haw. 2015) (Hawai'i Supreme Court case interpreting Hawai'i state statute that generally precludes employers from making an employment decision based on "arrest and court record") (radiology technician); *Nixon v. Pennsylvania*, 839 A.2d 277 (Pa. 2003) (Pennsylvania Supreme Court interpreting Pennsylvania Constitution) (eldercare providers).

certification, thereby waiving the argument. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (arguments not raised in the opening brief are deemed waived).

Because Dr. Falck and his agency have taken no action with respect to Herrera, they have not deprived him of any rights that he may have. The judgment for Dr. Falck should be affirmed on this ground as well.

3. Even If The State's Regulations Could Be Attributed To Dr. Falck, The Facts Alleged Do Not Support The Unconstitutionality Of The Regulations

Finally, even if the regulations for EMT certification could be attributed to Dr. Falck, Herrera's allegations are insufficient to state a claim for their unconstitutionality, either facially or as-applied.

i. The Facial Challenge Is Impermissibly Premature And Speculative

Herrera can succeed in a facial challenge only by showing that there is no set of circumstances under which the regulations would be valid, i.e., that it is unconstitutional in all of its applications. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008). Herrera's allegations in the FAC did not make this showing, particularly in light of the relief afforded to individual applicants, like himself, under the newly enacted AB 2147, of which Herrera has not yet availed himself. A person to whom the application of a law is constitutional will not be heard to attack the law on the grounds that it could be unconstitutionally applied to other persons or situations. *U.S. v. Raines*, 362 U.S. 17, 21 (1960). The

recent enactment of AB 2147 precludes Herrera's facial challenge to the EMT regulations, as his facial challenge must now rest impermissibly on "hypothetical" or "imaginary" cases until his pursuit of AB 2147 relief is complete. *Washington State Grange*, 552 U.S. at 449-50 (facial invalidity cannot be determined based on hypothetical or imaginary cases). Herrera has not alleged that he has pursued relief under AB 2147. ER-91-92 (¶ 88).

Such a speculative challenge cannot be the basis for reversing the judgment granted to Dr. Falck.

ii. Herrera Lacks Standing To Bring An As-Applied Challenge

To bring an as-applied challenge, Herrera must allege: 1) a distinct and palpable injury in fact that is 2) fairly traceable to the challenged provision or interpretation and 3) would likely be redressed by a favorable decision. *Real v. City of Long Beach*, 852 F.3d 929, 934 (9th Cir. 2017). For the reasons stated in Part V.C, *infra*, even if the State's regulations banning certification of recent or repeat felons could be attributed to Dr. Falck, Herrera lost standing to bring an as-applied challenge following the enactment of AB 2147, because AB 2147 creates a way for Herrera to expunge his felony record and avoid the felony bans entirely. Herrera, therefore, cannot prevail on an as-applied challenge.

For all the reasons stated above, Dr. Falck is not a proper defendant in this action. The judgment in his favor should be affirmed.

C. Alternatively, The Judgment For Dr. Falck Should Be Affirmed Because Herrera Is Not A Proper Plaintiff Under Article III

1. Plaintiff Lacks Standing To Sue Dr. Falck

If Herrera ever had standing to sue Dr. Falck, he lost it with the passage of AB 2147.

i. The Elements Of Standing

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies between litigants. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). Before the judicial process may be invoked, a plaintiff must allege facts that present a "case or controversy" in the constitutional sense and that show him to be a proper plaintiff to raise those issues. *McMichael v. Napa County*, 709 F.2d 1268, 1269 (9th Cir. 1983). Standing is an essential part of the case-or-controversy requirement of Article III. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

The elements of standing, which limit the category of litigants empowered to maintain a lawsuit in federal court, are: 1) injury in fact, 2) that is fairly traceable to the challenged conduct of defendant, and 3) that is likely to be redressed by a

favorable judicial decision. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). It is plaintiff's burden clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute through the remedial powers of the court. *Warth v. Seldin*, 422 U.S. 490, 517 (1975).

"Injury in fact" has two components, the first being a sufficiently concrete interest in the outcome of the suit to make it a case or controversy, and the second being whether, as a prudential matter, the plaintiff is the proper proponent of the particular legal rights on which he bases his lawsuit. *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). The injury must be concrete, particularized, and actual or imminent. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). The plaintiff must generally assert his own legal rights and interests, not rest his claim to relief on the legal rights or interests of others. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984).

ii. Herrera Makes No Arguments On Appeal To Defend His Standing To Sue, Resulting In Waiver

In his opening brief, Herrera offers no arguments whatsoever to establish his standing to sue. In his eagerness to reach the Fourteenth Amendment constitutional question, Herrera simply ignores Article III's case-or-controversy requirement, dismissing this most fundamental principle of the judiciary's proper role in our system of government as "a hodgepodge of procedural defenses." *Raines*, 521 U.S.

at 818; AOB at 18. Herrera presents no arguments in support of his standing to sue because he lacks standing. He has waived the issue. *Smith*, 194 F.3d at 1052.

iii. Herrera Has Not Established Injury In Fact

a. Herrera Has No Concrete, Particularized, And Actual Or Imminent Injury

Herrera is not a proper plaintiff to challenge the State's EMT regulations, because his allegations do not establish injury in fact. Herrera has not been injured in a way that is concrete, particularized, and actual or imminent, as he has not applied for certification to any LEMSA. ER-88 (¶ 63). Herrera merely fears that were he to apply, the State's regulatory scheme would require denial. A threatened injury, however, must be "certainly impending" to constitute injury in fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Allegations of *possible* future injury do not suffice. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). At present, Herrera complains only of possible injury: the possibility that were he to petition for expungement of his past convictions under AB 2147, his petition would be denied, leaving him subject to the mandatory provisions of Cal. Code Regs. tit. 22, § 100214.3(c)(3) (multiple felony ban) and/or (c)(6) (recent felony ban). Herrera's feared injury is therefore not "concrete, particularized, and actual or imminent." *Monsanto*, 561 U.S. at 149.

Ironically, in light of AB 2147, Herrera's feared *injury* differs little from the *relief* he professes to seek in this lawsuit. The gravamen of Herrera's complaint is

that the State's regulations violate the Fourteenth Amendment because they do not provide for "individualized consideration" – a "case-by-case analysis" – of an applicant's prior convictions and occupational fitness, rendering the regulatory scheme "irrational." AOB at 40, 54. Yet Herrera may obtain this "individualized consideration" and "case-by-case analysis" by filing a petition for expungement of his convictions in State superior court. Apparently, he will not do so, however, because it would require him "to hire a lawyer far from where he lives" and "a judge would have discretion to deny" his petition. AOB at 17 n.6; ER-91-92 (¶ 88).

The purported burden to Herrera of seeking AB 2147 relief – having to hire a lawyer and/or travel to a distant court – is minor. Herrera committed his offenses as a teen while growing up in or near Marysville in Yuba County. ER-83, 87-88 (¶¶ 9, 46-48, 52). He now sues Dr. Falck because Dr. Falck is the medical director of the LEMSA that oversees Marysville and Yuba County. AOB at 14; ER-83-84 (¶ 12). The allegations indicate that Herrera committed his offenses in Yuba County, where he now wants to be certified as an EMT. Attending proceedings in Yuba County Superior Court would not appear to be appreciably more burdensome than obtaining "individualized consideration" from the SSVEMS Agency that oversees Marysville and Yuba County. Given that Herrera has already obtained counsel in Arlington, Virginia (Andrew Ward and Joshua House), San Francisco, California (Thomas V.

Loran III), and Sacramento, California (Derek M. Mayor), the burden of finding lawyers "far from where he lives" also appears to be surmountable. AOB at 17 n.6.

Herrera's main concern, therefore, must be that AB 2147 relief is subject to the discretion of a judge. AOB at 17 n.6; ER-91-92 (¶ 88) ("those petitions could be denied according to judges' discretion"). He fears an AB 2147 petition could be denied, leaving him barred from EMT certification. It is unclear how the "individualized consideration" that Herrera professes to want could ever proceed in any forum, free of judicial discretion. But this conundrum need not be solved in order to know that judicial discretion does not constitute injury in fact. On the contrary, a litigant is not entitled to the benefit of judicial discretion, unless he can show injury in fact. Because AB 2147 relief is available to Herrera, he cannot show injury in fact from the State's EMT regulations. His fear of judicial discretion does not confer Article III standing.

b. Herrera Is Not The Proper Proponent Of The Legal Rights Upon Which This Lawsuit Is Based

Herrera also lacks standing as a prudential matter, because he is not the proper proponent of the legal rights at issue in this lawsuit. *Singleton*, 428 U.S. at 112. The lawsuit challenges the constitutionality of California's prohibitions on EMT certification for individuals convicted of multiple or recent felonies. The proper resolution of constitutional questions requires a plaintiff to demonstrate a "personal stake in the outcome" to ensure "that concrete adverseness which sharpens the

presentation of issues." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Herrera cannot demonstrate that he has a personal stake in the outcome, because he has the option of avoiding the regulatory restrictions through AB 2147 relief. Herrera does not have skin in the game. If he does not like the outcome of the present litigation, he can apply for AB 2147 relief instead. He is not the proper proponent of the rights at issue in this litigation. He lacks prudential standing.

The judgment for Dr. Falck should be affirmed because Herrera lacks standing to sue.

iv. The Challenged Conduct Is Not Fairly Traceable To Dr. Falck

To maintain standing, in addition to showing injury in fact, a plaintiff must also show that the injury is fairly traceable to the conduct of the defendant. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). Herrera's alleged injury is his inability to be certified as an EMT pursuant to Cal. Code Regs. tit. 22, § 100214.3(c)(3) and (c)(6). These regulations are not fairly traceable to Dr. Falck because they are State regulations that Dr. Falck "must . . . follow" (ER-93 (¶ 92)). The regulations themselves are traceable to the State, not to Dr. Falck. Moreover, the regulations would not bar Herrera from certification, if Herrera were to obtain AB 2147 relief. Herrera's failure to pursue and obtain AB 2147 relief is traceable to Herrera and/or his counsel, not to Dr. Falck.

Herrera lacks standing to sue Dr. Falck because his alleged injury is not fairly traceable to Dr. Falck.

2. Alternatively, Herrera's Case Has Been Mooted By AB 2147

The case-or-controversy requirement subsists through all stages of federal judicial proceedings. *Lewis v. Continental Bank Corp*., 494 U.S. 472, 478 (1990). The requisite personal interest that must exist at the commencement of the litigation must continue throughout the pendency of the case. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Where intervening legislation has settled a controversy involving only declaratory or injunctive relief, the controversy has become moot. *Matter of Bunker Ltd. Partnership*, 820 F.2d 308, 311 (9th Cir. 1987). This Court presumes that the amendment of legislation will render an action challenging the legislation moot, absent a reasonable expectation that the legislative body will reenact the challenged provision. *Bd. of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc).

Even if Herrera could have at one point satisfied the case-or-controversy requirement, he can no longer because of AB 2147. Herrera seeks only declaratory and injunctive relief, arising from a regulatory scheme that has been amended by intervening legislation, i.e., AB 2147. Herrera's claims are now moot. The Court

lacks jurisdiction to hear a moot case. *Matter of Bunker Ltd Partnership*, 820 F.2d at 310.

The judgment for Dr. Falck should be affirmed on the grounds of mootness.

3. Alternatively, The Court Should Decline To Reach A Constitutional Question Unnecessarily

A fundamental and longstanding principle of judicial restraint requires courts to avoid reaching constitutional questions in advance of the need to decide them. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 568 (1947) (articulating the policy of strict necessity in disposing of constitutional issues and the need for "clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions"). It is well-established that the Court should not normally decide a constitutional question if there is some other ground upon which to dispose of the case. *Bond v. U.S.*, 572 U.S. 844, 855 (2014); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring: "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'"); *Burton v. U.S.*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Because Herrera's case can be decided based on lack of standing and mootness, the Court should not reach the constitutional questions, if any, that he raises.

In fact, deciding any constitutional question at this point would be advisory. The nature and scope of any constitutional issues that Herrera may have cannot be known until after he petitions for relief under AB 2147. If Herrera's petition were to be granted, the challenged State regulations – Cal. Code Regs. tit. 22, § 100214.3(c)(3) and (c)(6) – will cause him no constitutional injury whatsoever. If, however, the petition were to be denied because expungement is found not to be in the interest of justice, Cal. Penal Code § 1203.4b(c), whether Herrera would have a colorable constitutional claim at that point may depend on the basis for the superior court's ruling and the outcome of subsequent appellate review. Unless and until Herrera petitions for relief under AB 2147, the nature and scope of any constitutional injuries that he may have are too speculative for the Court to reach. Constitutional questions should not be decided in a vacuum. *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309, 312 (1967).

The principle of judicial restraint requires that the judgment for Dr. Falck be affirmed.

D. The Defects In The FAC Cannot Be Cured

Herrera's factual allegations establish that he has no claim, because he will not avail himself of the AB 2147 relief for which he is eligible. ER-91-92 (¶ 88); AOB at 17 n.6. Herrera did not seek leave to amend in the court below or suggest any additional facts that he could alleged. FalckSER-8-22. His complaint fails and

he should not be granted leave to amend. *Reyns v. Pasta Bella LLC v. Visa USA Inc*., 442 F.3d 741, 749 (9th Cir. 2006) (generally, no remand for amendment unless the plaintiff sought leave to amend below).

Herrera's opening brief also does not contend that the district court erred by denying leave to amend. Instead, Herrera asserts on appeal that the facts he alleged were sufficient. AOB at 30, 49-53. On appeal, arguments not raised by a party in its opening brief are deemed waived. *Smith*, 194 F.3d at 1052. Herrera's complaint fails to state a claim against Dr. Falck and no remand for amendment should be permitted.

VI. CONCLUSION

Dr. Falck was brought into this case based on Herrera's allegation that he would apply for EMT certification from the SSVEMS Agency were it not for Cal. Code Regs. tit. 22, § 100214.3(c)(3) and (c)(6). Dr. Falck is not a proper defendant for Herrera's challenge to these State regulations. They are not the policy of the SSVEMS Agency. They are State law, which binds both Dr. Falck and Herrera. ER-93 (¶ 97) ("Medical directors of local emergency medical services agencies, including . . . Falck, must . . . follow these regulations").

Moreover, Herrera is not a proper plaintiff to challenge the State's regulations, because AB 2147 mooted his case. Herrera is eligible for AB 2147 relief. He can exempt himself from the restrictions of Cal. Code Regs. tit. 22, ¶ 100214.3(c)(3) and

(c)(6) by petitioning for expungement of his convictions in State court. Herrera therefore lacks standing to challenge the State's regulations because his allegations of constitutional harm no longer exist in a concrete way.

Herrera is not the right plaintiff and Dr. Falck is not the right defendant in this constitutional challenge. The district court was correct to dismiss both Herrera's facial and as-applied challenges to the State's EMT regulations.

The judgment for Dr. Falck should be affirmed.

DATED: July 12, 2021

RIVERA HEWITT PAUL LLP

/s/ Wendy Motooka
WENDY MOTOOKA
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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STATEMENT OF RELATED CASES

Appellee is unaware of any related cases, within the meaning if Circuit Rule 28-2.6, pending in this Court.

Date: July 12, 2021

RIVERA HEWITT PAUL LLP

/s/ Wendy Motooka
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Attorneys for Defendant/Appellee DR. TROY FALCK in his official capacity as Medical Director of the SSVEMS Agency

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2021, I electronically filed the foregoing DEFENDANT/APPELLEE DR. TROY FALCK'S ANSWERING BRIEF ON APPEAL with the Clerk of the Court for the United States of Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Melissa Green
MELISSA GREEN